IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE, CIVIL JURISDICTION

WRIT PETITION NO.3113 OF 1991

Shri Badrinarayan Jayrupchand Dave,)
since deceased by his heirs:-)
A. Vasanti Laxmikant Joshi)
Age 60 years, Occ. Household, R/at.)
Majeed Bandar Road, Veer Vitthaldas)
Chandan Street, Govind Khepalrao Mala)
B. Jambari Ravishankar Trivedi,)
Age 58 years, Occ. Household,)
R/at. Amar Complex, 15, August Chowk)
Somwar Peth, Pune-411 011.)
C. Sushila Motilalji Joshi,)
Age 56 years, Occ. Household,)
R/at. Manikpuira, Vasai.)
D. Nirmala Jawhar Joshi,)
Age 48 years, Occ. Household,)
R/at. Audhumbar Niwas, 266, Somwar)
Peth, Pune-411 011.)
E. Anandibai Badrinarayan Dave,)
Age 54 years, Occ. Service, R/at.)
44, Guruwar Peth, Pune-42.)
F. Ashok Badrinarayan Dav, Age 52 years)
Occ. Service, R/at.44, Guiruwar)
Peth, Pune-42.)..PETITIONERS
)(ORI.PLFFS.)

Versus

1.Smt. Badambai Pukhraj Jain, Aged)
about 55 years, Occupation Household)
residing at 227, Raviwar Peth,)
Pune-2.)
2.Shri Raman Pukhraj Jain, Aged about)
35 years, Occupation Business,)
residing at 712, Ghorpade Peth, Pune-2)
3.Shri Vilas Pukhraj Jain, Aged about)
30 years, Occupation Business,)
residing at 44, Guruwar Peth, Pune-2.)
4.Mrs. Pushpa Ramesh Oswal, Aged about)
25 years, Occupation Household work,)
residing at 54 to 57 Guruwar Peth,)
Pune-411 002.)
5.Mrs.Shashi Harakchand Oswal, Aged)
about 28 years, Occ. Household Work)
residing at 54 to 57, Guruwar Peth,)
Pune-411 002.)
All are legal representatives of)
deceased Shri Pukhraj Bhuramalji Oswal)
@ Jain).)..RESPONDENTS
)(ORI. DEFENDANTS)

Mr. V.B. Rajure, for the Petitioners

Mr. Vivek Salunkhe with Mr. Prafulla Shah, for Respondent

Nos. 1 to 5.

CORAM: ANOOP V. MOHTA, J.

DATE : 29TH JULY,2005

ORAL JUDGMENT:

1. The petitioner is landlord. The Respondents are tenants. On the ground under Section 13(1)(a), 13(1)(g) and 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short Bombay Rent Act) a suit was filed. After considering the material and evidence on record the Small Causes Court, Pune (trial Court) granted the decree for possession. In the appeal preferred by the Respondents the Appellate Court dismissed the same by the judgment and order dated 28th March, 1991. Therefore, the present Writ Petition by the landlord.

2. Heard Mr. Rajure, learned Counsel for the Petitioners and Mr. Praful Shah, learned Counsel for the Respondents. Learned Counsel appearing for the petitioners apart from submitting his case in support of the trial Court's order basically contended that the Appellate Court without giving full opportunity to the petitioner landlord, behind the back of the petitioner, considered an affidavit Exhibit 21 and based upon the same, passed the impugned order. The affidavit filed first time, had been taken on the record without following the normal procedure of law of taking additional/new documents on record reversed the finding. The basic averment

in this regard is reproduced as under:-

> "6. The petitioner submits that the appeal was fixed for hearing on 5-3-1991. Both the Advocates advanced their arguments at length and after the argument of the petitioner's Advocate was over the Advocate for the Respondent requested the Hon'ble Court to adjourn the appeal as he wanted to reply the argument. Therefore, the appeal was adjourned to 13-3-1991 for the reply of the Advocate for the respondents herein. On 13-3-1991 the Advocate for the Respondents herein filed his Sick note and, therefore, it was adjourned to 18-3-1991 for reply. On 18-3-1991 the Advocate for the respondents herein replied the argument and completed the same at about 12.00 noon. Thereafter the appeal was adjourned for judgment and and the Advocates and the parties left the Court premises. The petitioner submits that his Advocate went to the Appellate Court on 27-3-1991 and as the judgment was not ready on that day, the Appeal was adjourned to 28-3-1991. The judgment was pronounced on 28-3-1991. The Advocate for the petitioner herein came to know first time after reading the judgment about the affidavit of Shri Ashok Dave having been filed on 18-3-1991 after 3.00 P.M. There was no opportunity to argue on the said affidavit. It was not informed by the Court also nor by the other side that such an affidavit of Ashok Dave is filed in the Court. The petitioner, therefore, submits that the learned Judge of the Appellate Court has ignored the procedure and

practise of accepting the evidence at the Appellate Stage. The petitioner submits that neither he nor his Advocate was given an opportunity of filing the say, an objection or affidavit in reply to the said affidavit filed by Shri Ashok Dave. The petitioner submits that his Advocate was kept in dark about filing of the said affidavit in the Appellate Court. In view of this fact the petitioner submits that injustice has been done to me by the learned Judge of the Appellate Court by not allowing to cross examine Shri Ashok Dave, who has filed the affidavit when he himself has supported the case in the trial Court. Therefore, the learned Judge of the Appellate Court committed an error of law in relying upon the said affidavit of Ashok Dave and allowing the Appeal. It is contrary to the well settled principle of law, justice and equity."

3. To this learned Counsel appearing for the respondents vehemently opposed stating that there was material to justify the said additional affidavit filed by the petitioner for the first time in the Appellate Court. The contents of the said affidavit in fact reflected in the impugned judgment and order and that was also one of the foundation to reverse the reasoning of the trial Court.

4. The learned Counsel appearing for the petitioner relied on AIR 1981 SC 1113 M.M. Quasim v. Manohar Lal Sharma, in reference to Order 41 Rule 27 read with Order 19

Rule 1 of the Code of Civil Procedure. In the present case no such procedure admittedly complied with. Therefore, without going into the merits of the matter at this stage and in view of the principles of natural justice and further in view of the undisputed position that the affidavit was filed for the first time in the Appellate Court I am of the opinion that full opportunity should be given to the petitioner landlord. In view of this I am inclined to interfere with the finding given by the Appellate Court. Taking into account the above circumstances the impugned judgment and order dated 30th March, 1991 is quashed and set aside. The matter is remitted back to the Appellate Court to consider the affidavit Exhibit 21 by giving full opportunity to the petitioner landlord and to pass orders accordingly.

5. In the result petition is allowed in view of the above observations. No order as to costs. The Appellate Court to decide the Appeal within three months from today. C.C. expedited.

(ANOOP V. MOHTA, J.)

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